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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, and LEYBDA CORPORATION, S.A.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below in forfeiting a Lear jet based on misrepresentations of crew members in applications for temporary visas erroneously decided that the standard for materiality contained in *Chaunt v. United States,* 364 U.S. 350 (1960), governing misrepresentations in a naturalization application, should not apply to those contained in a visa application?

2. Whether the court below's standard for material misrepresentation under 8 U.S.C. § 1182(a)(19)—that a "misrepresentation may be material because it frustrates the government's ability to assess the visa application in its true light"—reads the requirement of materiality out of the statute, and is inconsistent with the second prong of *Chaunt v. United States,* 364 U.S. 350 (1960) and with *Fedorenko v. United States,* 449 U.S. 490 (1981)?

3. Whether a determination of materiality within the meaning of 8 U.S.C. § 1182(a)(19) is possible in the *total absence* of any evidence in the record concerning the *effect* or even possible effect of a misstatement on the applicants' admissibility into the country, and indeed, where the record demonstrated that the alleged misrepresentations had no effect in view of the subsequent granting of visas to these applicants?

4. Whether the government can sustain a forfeiture based on an alleged violation of 8 U.S.C. § 1182(a)(19), in the absence of *any facts* in the record establishing willfulness of the alleged material misrepresentation, or *any findings* made by the district court concerning such willfulness?

PARTIES TO THE PROCEEDINGS

The Petitioners are: Leybda Corporation, S.A. and One Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO.

The Respondent is the United States of America.

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OPINIONS BELOW

On March 2, 1987, the United States Court of Appeals for the Eleventh Circuit issued an unreported order denying Petitioners' request for rehearing and suggestion for rehearing *en banc*. (P.A. 39-40). The court has not issued the mandate in this case. The panel decision of the Eleventh Circuit Court of Appeals affirming the decision of forfeiture of the United States District Court for the Southern District of Florida was entered on January 23, 1987, and is reported at 808 F.2d 765 (11th Cir. 1987). (P.A. 1-22).

The district court's unreported final judgment of forfeiture in favor of the Respondent was entered on September 12, 1985 (P.A. 43-44), as was that court's reported opinion. 617 F. Supp. 769 (S.D. Fla. 1985). (P.A. 23-38). Other orders of the district court including its denial of Petitioners' request for rehearing under Fed. R. Civ. P. 59(b) and 60(b) are also not reported. (P.A. 41-42).

JURISDICTION

This petition seeks review of the decision of a panel of the United States Court of Appeals for the Eleventh Circuit entered on January 23, 1987 (P.A. 1-22), affirming the judgment of forfeiture entered by the United States District Court, Southern District of Florida, on September 12, 1985. (P.A. 23-38). The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the standard to be applied in determining material misrepresentations under 8 U.S.C. § 1182(a)(19) in the context of a forfeiture pursuant to 8 U.S.C. § 1324(b).

The statutes in effect at the time of the forfeiture stated:

8 U.S.C. § 1182(a)(19):

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

8 U.S.C. § 1324(a):

> (a) Persons liable
>
> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto,

transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

8 U.S.C. § 1324(b)(1):

any vessel, vehicle or aircraft which is used in the commission of a violation of subsection (a) shall be subject to seizure and forfeiture, except when—

(A) the owner, master or other person in charge of such vessel, vehicle or aircraft, was not, at the time of the alleged illegal act, a consenting party or privy thereto.

———o———

STATEMENT OF THE CASE

1. Course of Proceeding, and Disposition of the Case

This case was initiated by the seizure of a Lear jet owned by Petitioner Leybda Corporation, S.A. ("Leybda"). The jet was seized on September 6, 1980 by the Immigration and Naturalization Service ("INS") based upon alleged misrepresentations by the jet's crew members in applications for temporary, nonimmigrant visas presented to the United States Embassy in Managua, Nicaragua in April, 1980. The crew members were not employed by Leybda at the time the applications containing misrepresentations were presented to the Embassy. Rather, they were employed by the Ministry of Transportation of the Government of Nicaragua.

On January 19, 1981, the United States initiated a one count forfeiture action against Leybda's Lear jet. Petitioners' Appendix in the Eleventh Circuit Court of Appeals ("P.C.A.")[1] 27-29. Approximately eighteen months after the action was initiated, the government moved to amend its complaint to add four additional causes of action. R. 1-58, P.C.A. 30-37. Count II of the amended complaint, alleging violations of the Trading with the Enemies Act, was dismissed prior to trial because a civil violation of that Act cannot result in a forfeiture. R. 3-104. Count III, al-

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[1] The following citation abbreviations are used herein: "P.C.A." refers to Petitioners' Appendix submitted with its initial brief in the court of appeals. "Px." refers to Petitioners' exhibits, "Gx." refers to the Government's exhibits, and "L.R." refers to letters rogatory introduced as the court's exhibit in the trial court. "R" refers to the record on appeal. "P.A." refers to Petitioners' Appendix to its Petition in this Court.

leging violations of the Export Administration Act, was dismissed at the government's own request at trial. R. 15-31. The government failed to prove counts IV and V at the trial and judgment was entered on these counts in favor of Petitioners. *United States v. One Lear Jet*, 617 F. Supp. 769, 774, 776 (S.D. Fla. 1985). (P.A. 32-33).

On September 12, 1985, the district court entered its Findings of Fact and Conclusions of Law and Final Judgment. 617 F. Supp. 769 (S.D. Fla. 1985). (P.A. 23-38). In its decision, the district court made no finding that the crew members had *willfully* misrepresented any statements and, in fact, characterized the crew members' statements benignly as not being "accurate" or "correctly listed." 617 F. Supp. at 775. (P.A. 34). In finding that a "material" misrepresentation had been made and in supporting the forfeiture, the district court ignored *Chaunt v. United States*, 364 U.S. 350 (1960) and *Fedorenko v. United States*, 449 U.S. 490 (1981), and held the misrepresentations material on the grounds that "further action may have been taken and further investigation may have been made" or "an investigation . . . may have been commenced." 617 F. Supp. at 775. (P.A. 34). On October 10, 1985, Petitioners moved for a new trial and to reopen the record to consider evidence concerning the lack of material misrepresentations by the Lear jet crew. R. 10-345. The motion was based upon the submission of copies of new D visas issued by the United States Embassy in Managua to the crew members who were, once again, working for the Nicaraguan Government, as they had been when the original visas were issued. The motion was denied. (P.A. 41-42). A panel of the Court of Appeals for the Eleventh Circuit entered its

opinion on January 23, 1987, affirming the district court. 808 F.2d 765 (11th Cir. 1987). (P.A. 1-22).

In affirming the district court, the panel rejected the applicability of *Chaunt* to this case, 808 F.2d at 772 n.5, (P.A. 15), and held that materiality is established when the misrepresentation "frustrates the government's ability to assess the visa application in its true light," 808 F.2d at 771, P.A. 13, or "misleads the government officials with respect to an area of *potential* significance in the decision to grant or deny the visa." 808 F.2d at 773. (P.A. 1677). The Eleventh Circuit thereafter denied Petitioners' request for rehearing and suggestion for rehearing *en banc*. (P.A. 39-40).

2. Statement of Facts

Leybda, a Panamanian corporation, is the owner of the defendant, One Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO ("Lear jet"). Leybda is a wholly owned subsidiary of Agropecuaria Cardenal, Reyes, S.A., a Nicaraguan corporation. Letters Rogatory[2] of Dr. Jacinto Abregon Sanchez. L.R.-Abregon p. 28, q. 16; P.C.A. 164, 182.

Leybda purchased the Lear jet to use as a commercial vehicle for an air taxi or air charter service and hired the former Finance Minister of the Republic of

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2 Leybda's officers testified by Letters Rogatory and deposition due to the government's continued refusal to agree that they would not arrest any Leybda witness that testified. R. 2-69-6-7; R. 2-71-5-6; R. 19-2-3. Although Leybda's employees and officers believed that any arrest would be without foundation, they did not wish to risk the possibility of entering the United States because of the government's position.

Panama to make the purchase. Deposition of Dr. Gabriel Castro Suarez at 13, P.C.A. 267. The Lear jet was purchased from a United States company, Management Jets International, Inc., and subsequently did serve as an air taxi service in the Carribean and Central America, including among its passengers Wayne Smith, the head of the United States Interests Section in Cuba. R. 10-329a, R. 10-330-3-9.

In 1980 the crew which flew the aircraft began working for the Ministry of Transportation of Nicaragua after Leybda leased the aircraft to the Nicaraguan Ministry of Transportation, leaving the Ministry with the responsibility for all matters concerning the crew. L.R.-Abregon p. 26, q. 14, p. 29 l. 23, C.A. 160, 179; 265, 183.

On April 8, 1980, an official government request by a letter of protocol was made by the Foreign Ministry of the Government of Nicaragua to the United States Embassy in Managua, Nicaragua, to request United States visas for two of the crew members as "pilots in the service of the Transportation Department, who are coming to [the United States] in performance of their normal duties." Gx. 5a, R. 12-42-45. The same protocol letter and official request was made on behalf of the third crew member several days later. *Id.* The letters of protocol accompanied the crew members' Nicaraguan passports and applications for visas, which applications substantiated that they were employed by the Ministry of Transportation. R. 12-44. Leybda was not involved in the application process or any of the requests, as the crew was not employed by it.

The visa applications were not filled in by the crew, but by someone in the Ministry of Transportation; the crew thereafter signed the applications without reviewing them. L.R.-Espinosa p. 12, q. 3(g), P.C.A. 141, 170; L.R.-Toledo p. 20, q. 3(g), P.C.A. 150, 172; L.R.-Herrera p. 21, q. 3(g), P.C.A. 153, 175. The applications truthfully and accurately stated the crew members' names, nationalities, dates of birth, places of birth in Cuba, their place of employment at the Ministry of Transportation, the purpose for their trip to the United States, and all personal statistics Gx. 4A, B, C, R. 12-42. The only discrepancies that the Respondent alleged were the time that the crew members stated they had lived in Nicaragua (Gx. 4A, B, C, q. 36), whether or not they had ever requested a visa to come to the United States previously (Gx. 4A, B, C, q. 11), and in the case of one crew member, whether or not he had ever been in the United States. (Gx. 5C, q. 16).

B-1 and D visas were subsequently issued to the crew members. There is no record evidence to suggest that the crew members' applications, sent by diplomatic channels, were ever reviewed by the United States Embassy before issuing the visas. There is no record evidence that the applications which contained the alleged misstatements were even considered or used as the basis for the issuance of the visas by the U.S. Embassy in light of the official letters of protocol and government-to-government request. R. 13-87; R. 15-154-155 (government stipulation); R. 16-12. Moreover, no testimony was presented at trial by any gov-

ernment witness at the Embassy or by any expert witness stating that the misstatements might have, or would have, made a difference in the issuance of the visas at the Embassy if the true facts were known.

Subsequent to the grant of visas the crew members entered the United States at least eight to twelve times without any incident between April and September, 1980. R. 104-46. L.R. Espinoza, Toledo, Herrera, p. 12, 20, 25, q. 3(h), P.C.A. 141, 169; 151, 172; 157, 175. The admission of crew members, as the government conceded, was facially valid on all occasions. *Id.* None of the crew members ever attempted to enter the United States surreptitiously and all crew members left the United States when they were supposed to leave under the terms of their admission. R. 13-146-48, 154-56 (government stipulation). Nor did the aircraft itself contain any indication that it was used for illegal purposes, such as counterintelligence or drug or alien smuggling. R. 15-190, 192.

On September 1, 1980, the crew were forced to bring the aircraft to the United States for emergency repairs due to a broken fuel computer. L.R.-Espinosa, Toledo, Herrera, p. 12, 20, 25, q. 3(m), P.C.A. 141, 169; 151, 172; 157, 175. The loss of the Lear jet's fuel computer was an extremely serious matter, which prevented the aircraft from being airworthy under FAA standards and could have resulted in its crash. R. 10-316, p. 2 (second set of requests for admission, nos. 2-3); R. 16-53-54. Upon arrival in Miami, the crew members truthfully and accurate-

ly stated the purpose of their trip to the United States. R. 13-115-16, R. 11-97-98, R. 14-158-60. They accurately and truthfully completed I-94 forms. R. 11-64-66, 68; R. 13-125.

Subsequent to their admission, the crew flew the Lear jet directly to a maintenance facility, Graf Jets, in South Florida. R. 16-52. On September 4, 1980, they flew the aircraft out of the United States but were required to make an emergency landing due to a faulty fuel computer. Upon return to their aircraft the following day, they were arrested by a battery of FBI, FAA, INS, and Customs officials. The aircraft was seized the following day. The seizure of the aircraft and the subsequent effort to forfeit it were not based upon fraud or any matter whatsoever involving Leybda, but rather upon misrepresentations made by the Ministry of Transportation of Nicaragua in filling out the original *applications* for temporary visas for the crew members at the United States Embassy in Managua, Nicaragua, while they were employed not by Leybda, but by the Ministry of Transportation.

In 1984, while the forfeiture case was pending, and with knowledge of all the facts, the same crew members once again were issued D visas to enter the United States by the United States Embassy in Managua, Nicaragua. L.R.-Espinosa, Toledo, Herrera, p. 12, q. 2, 3(g); p. 20, q. 2, 3(g); p. 21, q. 2, 3(g), P.C.A. 141, 169; 150, 172; 153, 175; R. 10-345.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN FEDORENKO V. UNITED STATES, 449 U.S. 490 (1981) AND CHAUNT V. UNITED STATES, 364 U.S. 350 (1960), AND WITH EVERY OTHER CIRCUIT COURT OF APPEALS TO HAVE CONSIDERED THE ISSUE.

A. The Decision Below That The Chaunt Standard For Materiality Governing Misrepresentations In A Naturalization Application Should Not Apply To Those Contained In A Visa Application Conflicts In Principle With This Court's Decision In Chaunt, Conflicts Directly With The Decision Of Every Other Court Of Appeals To Have Considered The Question, And Is Presently Before This Court In Kungys v. United States, 107 S. Ct. 431 (No. 86-228, cert. granted, Nov. 10, 1986).

The court of appeals rejected the contention that the standard for materiality of a misrepresentation contained in this Court's decision in *Chaunt v. United States*, 364 U.S. 350 (1960), applied in the context of a visa application. 808 F.2d at 772 n.5. (P.A. 15). *Chaunt* involved the revocation of citizenship, and the panel found *Chaunt* inapplicable "in the context of a forfeiture predicated upon visa fraud." *Id.* This determination, as the government has conceded elsewhere,[3] is inconsistent with the approach of every other court of appeals to have considered the question. *See Maikovski v. INS*, 773 F.2d 435, 441 (2d Cir. 1985) (citing cases), *cert. denied*, 106 S. Ct. 2915 (1986); *United States v. Fedorenko*, 597 F.2d 946, 951 (5th

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[3] Brief for Respondent, *Kungys v. United States*, No. 86-228, at 28 ¶ 5 ("We know of no court that has applied a different standard at the visa stage than at the naturalization stage . . . .")

Cir. 1979), *aff'd on other grounds,* 449 U.S. 490 (1981); *Kassab v. INS,* 364 F.2d 806, 807 (6th Cir. 1966); *United States v. Rossi,* 299 F.2d 650 (9th Cir. 1962); *Langhammer v. Hamilton,* 295 F.2d 642, 648 (1st Cir. 1961).

The applicability of the *Chaunt* test in the visa fraud context is a significant and open question that was referred to in this Court's opinion in *Fedorenko v. United States,* 449 U.S. 490. 508-09 (1981), and is presently before this Court in *Kungys v. United States,* 107 S. Ct. 431 (No. 86-228, *cert. granted,* Nov. 10, 1986) (oral argument scheduled April 27, 1987).[4] For this reason alone, the issue is obviously important and this Court should grant the petition or postpone consideration of it pending decision in *Kungys.*

B. The Court Below's Construction Of The Second Prong Of The Chaunt Test Is Inconsistent With That Case And With Fedorenko v. United States, 449 U.S. 490 (1981), And Would Effectively Eliminate Materiality As A Requirement Of A Violation Of 8 U.S.C. § 1182(a)(19). The Question Of The Proper Meaning Of The Second Prong Of Chaunt Is Also Presently Before This Court In Kungys v. United States, 107 S. Ct. 431 (No. 86-228, cert. granted, Nov. 10, 1986).

As a fall-back, the court of appeals attempted to suggest that even if *Chaunt* did apply in the visa context, "the

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[4] The second question presented in petitioner's petition for certiorari in *Kungys* is "Does same test or tests of materiality for revoking citizenship apply to invalidation of visa?" 55 U.S.L.W. 3335 (Nov. 7, 1986). Significantly, the respondent's brief in *Kungys* does not dispute the applicability of the *Chaunt* test in the visa context. *See* Brief for Respondent, *Kungys v. United States,* No. 86-228, at 28 ¶ 5.

government's evidence in this case was sufficient to satisfy the second prong of the *Chaunt* test." 808 F.2d at 772 n.5. (P.A. 15). However, the panel's various formulations of the test for materiality are quite inconsistent with the formulation of the second prong contained in *Chaunt*, and would read the materiality requirement out of the statute. The second prong of *Chaunt* is that the "disclosure might have been useful in an investigation possibly leading to the discovery of other facts *warranting the denial of citizenship.*" *Chaunt v. United States*, 364 U.S. at 355 (emphasis added).

Although the court of appeals purported to apply this second prong of *Chaunt*, its formulation of the materiality standard was quite different. At one point the court of appeals suggested that "a misrepresentation may be material because it frustrates the government's ability to assess the visa application in its true light." 808 F.2d at 771. (P.A. 13). At another point, the court of appeals concluded that "[t]he essential feature of a material misrepresentation is that it misleads the government officials with respect to an area of *potential* significance in the decision to grant or deny the visa." 808 F.2d at 773. (P.A. 16-17). These standards neglect the requirement in the second prong of *Chaunt* that the investigation might lead to the discovery of other facts which themselves would warrant the denial of the application. *All* misrepresentations, by their nature, "frustrate[] the government's ability to assess the visa application in its true light." As a result, the court of appeals' formulation of the standard encompasses all misrepresentations, whether material or not. Congress plainly and expressly required that, for a for-

feiture to occur, the misrepresentation be material. 8 U.S.C. § 1182(a)(19) ("willfully misrepresenting a material fact"). Similarly, the formulation of the standard in terms of "potential significance" is too all encompassing. Every misrepresentation has potential significance on the decisionmaking process; however, it is only those that are "material," *i.e.*, those that would have had an effect on the applicant's admissibility, that should be held to meet this standard. *See Fedorenko v. United States*, 449 U.S. 490, 509 (1981) ("It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country.").

The court of appeals' formulation of the test is thus quite inconsistent with this Court's opinion in *Chaunt*, directly contrary to *Fedorenko's* clear statement that materiality must be measured "in terms of its effect" on admissibility, and would read the materiality requirement out of the statute. The proper meaning of the second prong of the *Chaunt* test of materiality is also presently before this Court in *Kungys v. United States*, 107 S. Ct. 431 (No. 86-228, *cert. granted*, Nov. 10, 1986).[5] Accordingly, the petition should be granted or its determination should be postponed pending decision of this issue in *Kungys*.

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[5] The first question presented in petitioner's petition for certiorari in *Kungys* is "Which, if any, of several conflicting and divergent formulations interpreting second prong of *Chaunt v. U.S.* governs heavy burden of proving 'material' misrepresentation in order to denaturalize citizen?" 55 U.S.L.W. 3335 (Nov. 7, 1986).

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A DETERMINATION OF MATERIALITY WITHIN THE MEANING OF 8 U.S.C. § 1182(a)(19) IS POSSIBLE WHERE THERE IS A TOTAL ABSENCE OF EVIDENCE CONCERNING THE EFFECT OF THE MISSTATEMENTS AND WHERE VISAS WERE SUBSEQUENTLY ISSUED TO THE INDIVIDUALS WHO MADE THE MISSTATEMENTS AFTER FULL DISCLOSURE OF ALL FACTS.

In order to determine materiality of a false statement there must be evidence in the record sufficient to support the conclusion that the false statements in question would have had an effect on the applicant's admissibility. Here, there was no evidence in the record whatsoever concerning the likely effect, or even possible effect, of these misstatements on admissibility. Rather, the court of appeals concluded, apparently as a matter of law, that these misstatements were material. *See* 808 F.2d at 772. (P.A. 14) ("We have little doubt that these misrepresentations were 'material' for purposes of 8 U.S.C. § 1182(a)(19)"); 808 F.2d at 773. (P.A. 16) ("Disclosure of the true facts on the visa applications involved in this case almost certainly would have effected the decision made in 1980 with regard to those applications by the United States Embassy in Managua.") There quite simply is no record support whatsoever for these inferences.

Indeed, the record supports just the opposite conclusion. The very best evidence concerning the effect of the misstatements on the admissibility of these applicants is the subsequent grant of the three crew members' applications in 1984 when the true facts were known. L.R.-Espinosa, Toledo, Herrera p. 12, q. 2, 3(g); p. 20, q. 2, 3(g); p. 21,

q. 2, 3(g), P.C.A. 141, 169; 150, 172; 153, 175; R. 10-345. The court of appeals' attempts to ignore this significant evidence in the record by asserting that Petitioner "has not produced documentary evidence that these visas have in fact been granted." 808 F.2d at 772. (P.A. 16).

In fact, this assertion is false. Petitioners did produce copies of the subsequent visas issued to the crew members in 1984. R. 10-345. Moreover, the court of appeals mentioned that the "government disputes that these visas were granted noting that because they were previously deported, the crew members could only have been granted visas by special permission of the attorney general." 808 F.2d at 772. (P.A. 16). However, the record is barren of any evidence whatsoever submitted by the government in support of such a contention. Rather, the government raised this contention as legal argument in response to Petitioner's Motion for Reconsideration submitted in the district court. Arguments of counsel are not facts, however, just as litigation affidavits of counsel containing *post hoc* rationalizations are not facts. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419 (1971).

Moreover, the uncontradicted evidence *in the record* demonstrated that the visa applications of the crew members were submitted by the government of Nicaragua, Gx. 5a, R. 12-42-45. As a government-to-government request, there was no evidence to indicate that the Consul at the United States Embassy would have investigated or denied the request under *any* circumstances. Indeed, there is no evidence in the record to indicate that the visa applications were even reviewed by the United States Embassy as they

were sent as protocol documents from the Foreign Ministry of Nicaragua to the United States Embassy. R. 13-87; R. 15-154-55 (government stipulation); R. 16-12.

The court of appeals conceded that merely being a former Cuban citizen—the subject matter of the misstatement—was not itself disqualifying for admissibility as a matter of law. 808 F.2d at 772, (P.A. 14) ("these regulations certainly would not preclude the issuance of a visa to former Cuban citizens"). As a result, any conclusion that these misstatements would have effected admissibility must be supported by competent testimony by a consular or other official knowledgeable with respect to non-immigrant visa applications and the effect such misstatements have on the consular decisionmaking process. Because there was no evidence whatsoever of this kind in the record, or any other evidence supporting the court of appeals' conclusion, certiorari should be granted to clarify that the question of materiality is a question of fact which must be supported by evidence in the record.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW WOULD PERMIT A FORFEITURE BASED UPON AN ALLEGED VIOLATION OF 8 U.S.C. § 1182(a)(19) WITHOUT ANY FINDING OF WILLFULNESS OR ANY FACTS IN THE RECORD TO SUPPORT SUCH A FINDING.

In order to establish the predicate violation of 8 U.S.C. § 1182(a)(19), it must be shown that the alien in question has procured a visa or other documentation "by fraud, or by *willfully* misrepresenting a material fact . . . ." (emphasis added); *see, e.g., Fedorenko v. United States*, 449 U.S. 490, 507 & n.28 (1981); *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985); *Castaneda-Gonzalez v.*

INS, 564 F.2d 417, 434 (D.C. Cir. 1977); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977). Under this provision, the government must show not only materiality of the misrepresentation, but also "the separate and independent requirement of willfullness." *Castaneda-Gonzalez v. INS*, 564 F.2d at 434.

Here, the record contains absolutely *no* evidence concerning willfulness, and the district court made *no* findings whatsoever on this critical factor. *See* 617 F. Supp. 769 (S.D. Fla. 1985). (P.A. 23-38). The court of appeals mistakenly stated that the district court had found willfulness, and then concluded that this finding was not clearly erroneous. 808 F.2d at 771. (P.A. 11-12). Not only did the district court fail to make the requisite finding of willfulness, but it characterized the crew members' statements benignly, as not being "accurate" or "correctly listed." 617 F. Supp. at 775. (P.A. 34).

In order to establish the necessary element of willfulness, the government must show through evidence in the record that the material misrepresentation was "knowingly and intentionally" made. *Castaneda-Gonzalez v. INS*, 564 F.2d at 434. The misrepresentation must be shown to have been "deliberate and voluntary." *Hernandez-Robledo v. INS*, 777 F.2d at 539; *Espinoza-Espinoza v. INS*, 554 F.2d at 925. The record contains absolutely no evidence whatsoever that these statements, even if inaccurate, were either deliberate and voluntary, or knowingly and intentionally made. Because the court of appeals totally ignored this critical requirement, certiorari is appropriate to clarify whether a violation of 8 U.S.C. § 1182(a)(19) can occur without a finding of willfulness.

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CONCLUSION

By accepting certiorari in *Kungys v. United States* on the very issues presented here concerning the applicability of *Chaunt v. United States* to visa applications and the meaning of the second prong of the *Chaunt* test, this Court has recognized the significance of those issues. The decision of the Eleventh Circuit challenged here finding *Chaunt* inapplicable to visa applications is also directly in conflict with the decisions of all other circuits that have addressed the question. Moreover, the standard applied by the Eleventh Circuit in finding a material misrepresentation without any evidence in the record concerning the effect of the misstatements and without any record support for a finding of willfulness is unprecedented and clearly at odds with this Court's opinions in *Chaunt* and *Fedorenko*. For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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BRUCE J. WINICK, ESQ.

By: IRA J. KURZBAN, ESQ.

UNITED STATES of America,

Plaintiff-Appellee,

v.

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, Defendant,

Leybda Corp., Claimant-Appellant.

No. 85-5938.

United States Court of Appeals, Eleventh Circuit.

Jan. 23, 1987.

Action was brought for forfeiture of aircraft. The United States District Court for the Southern District of Florida, 617 F.Supp. 769, No. 81-6031-CIV-LCN, Lenore Carrero Nesbitt, J., upheld forfeiture, and aircraft's owner appealed. The Court of Appeals, Clark, Circuit Judge, held that: (1) Government's removal of aircraft during pendency of appeal did not deprive court of jurisdiction to entertain that appeal; (2) action based on predicate offense of visa fraud fell within scope of narrow construction of forfeiture statute; (3) district court's finding that aliens' misrepresentations on visa application were willful was not clearly erroneous; (4) Government was not required to establish causal relation between misrepresentations and granting of visa application for those misrepresentations to be material; (5) Government could refuse discovery request for documents which district court had found were privileged and irrelevant; (6) aircraft owner's

request, more than four years after filing of complaint, for jury trial was untimely; and (7) district court was not required to grant continuance or order mistrial based on FBI agent's late disclosure of notes regarding investigation.

Affirmed.

* * *

Ira J. Kurzban, Kurzban, Kurzban & Weinger, P.A., Miami, Fla., for claimant-appellant.

Leon B. Kellner, U.S. Atty., Jonathan Goodman, David O. Leiwant, Sonia Escobio O'Donnell, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

CLARK, Circuit Judge.

This is a civil forfeiture action brought by the United States against a Lear jet. The government alleged, *inter alia,* that the jet's crew members entered this country illegally, having made material misrepresentations on their visa applications. *See* 8 U.S.C. § 1182(a)(19). These violations would trigger the criminal penalty provisions of 8 U.S.C. § 1324(a) and, in turn, the civil forfeiture provisions of 8 U.S.C. § 1324(b) (West Supp.1986). Leybda Corporation, a Panamanian subsidiary of a Nicaraguan corporation, claims ownership of the jet and challenges the validity of the forfeiture. The district court, 617 F.Supp. 769, upheld the forfeiture. We affirm.

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*Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

FACTS

Leybda purchased the jet from a dealer in Lincoln, Nebraska for 3.3 million dollars in February, 1980. According to Leybda, the jet was used as an air taxi, flying government officials from the United States, Nicaragua, Jamaica, and other countries to different parts of North and South America and the Caribbean. The pilot (Espinosa) and the two crew members (Toledo and Herrera) were Cuban nationals who had previously worked for Cubana de Aviacion, the Cuban national airline. Between April and September of 1980, the jet and crew entered the United States eight to twelve times, apparently without incident.

On September 1, 1980, the jet landed at Miami International Airport. The jet had just left Cuba and came to Miami to repair a faulty fuel computer. Espinosa, Toledo and Herrera presented their Nicaraguan passports to United States custom inspectors. They each had facially valid non-immigrant B-2 and D-1 visas issued by the United States Embassy in Managua. The applications for these visas had been submitted, along with supporting Letters of Protocol from the Nicaraguan government, to the United States authorities in Managua in April, 1980.

Upon arrival in Miami, the crew members filled out several United States immigration forms. They each claimed to be Nicaraguan citizens and claimed they boarded the jet in Managua. Each listed Cuba as their place of birth and gave their Nicaraguan passport numbers.

On September 2, the crew flew the jet to Ft. Lauderdale for repairs. They attempted to leave on September 4, but had to turn back because of additional problems with the fuel computer. When the crew returned to the jet on September 5, they were being watched by F.B.I. and I.N.S. agents, who had received information that the jet was

being operated by the Cuban government. The crew members were seen talking to Oscar Vasquez, who is listed on corporate documents as Leybda's vice president, although Leybda claims it terminated Vasquez' employment on April 1, 1980.[1] The agents interviewed the four men. Espinosa showed his Nicaraguan pilot's license and told the agents that the jet belonged to a Panamanian company with which Vasquez was affiliated. The crew members denied having applied for visas as employees of Cubana Airlines. The three were arrested and charged with violating United States immigration laws, and the jet was seized.

Each crew member subsequently pled guilty to charges of knowingly possessing a visa application which contained false statements, in violation of 18 U.S.C. § 1546. A United State immigration judge found that Espinosa, Toledo and Herrera were admitted to the United States by presenting a visa obtained by the filing of an application misrepresenting material facts.

The district court found that the crew members made several material misrepresentations in their April, 1980 visa applications. We accept the factual findings of the district court unless they are clearly erroneous. *See United States v. Koziy,* 728 F.2d 1314 (11th Cir.), *cert. denied,* 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). Espinosa was born in Cuba and lived there for the first thirty-four years of his life. Yet, although he listed Cuba as his place of birth, he told United States authorities in Managua that he was a Nicaraguan national and he failed to include Cuba as one of the countries he had lived in for more than

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1. At trial, the government used Vasquez' affiliation with Leybda to show that Leybda was aware of the immigration violations committed by the crew members. The government also attempted to show that Vasquez was connected in some way to the Cuban government.

six months during the preceding five years. He also denied submitting any prior applications for a United States visa. Yet he applied for a visa in June, 1979, when he was employed by Cubana Airlines.

Toledo also denied making any prior visa applications. The government showed that Toledo in fact submitted two prior visa applications to the United States Interest Section in Havana, the latest one being submitted in January, 1980. In the Managua visa application, Toledo indicated that he had resided in Nicaragua for the prior ten years. In the January, 1980, application, however, he listed a Cuba address as his domicile.

Herrera submitted three visa applications in Havana prior to submitting his application in Managua. In his Managua application, however, Herrera denied making any prior visa applications. He represented that he had lived in Nicaragua for the previous six years, although in one of his prior visa applications he stated that he had lived in Cuba his entire life.

At trial, the government contended that these misrepresentations were material and that Leybda had knowledge that these misrepresentations were made.[2] The district court found for the government and decreed that the jet was forfeited to the United States government. *United States v. One Lear Jet Aircraft,* 617 F.Supp. 769 (S.D.Fla. 1985). Leybda appeals from the district court's decision.

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2. The government offered unrebutted evidence that Oscar Vasquez acted as Leybda's agent and directed the operations of the jet and crew. In fact, in light of Leybda's reluctance to present testimony from its officers, the district court found that Vasquez was the *only* individual acting on behalf of Leybda during the events which occurred prior to the seizure of the aircraft. 617 F.Supp at 775.

I. JURISDICTION

Before proceeding to the merits, we must confront the government's assertion that this court lacks jurisdiction to entertain this appeal. Final judgment in this case was entered on September 12, 1986. On October 4, 1986, the jet was flown by the government to a private facility in Missouri. Leybda, having already noticed this appeal, noticed an appeal to the Eighth Circuit Court of Appeals. That court dismissed the appeal for lack of jurisdiction. The government asserts that this court lost jurisdiction when the jet, the res in this in rem action, was moved outside the territorial jurisdiction of this court.

The government relies on our decisions in *L.B. Harvey Marine, Inc. v. M/V River Arc,* 712 F.2d 458 (11th Cir. 1983) ("The presence of the res within a court's territorial jurisdiction is necessary before a court can proceed to adjudication."), and *Taylor v. Tracor Marine, Inc.,* 683 F.2d 1361 (11th Cir.1982) ("Where the res is no longer before the court, its in rem jurisdiction is destroyed, and any appeal from its decision is rendered moot."), *cert. denied,* 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983).

L.B. Harvey and *Taylor* are distinguishable from the present case. In *L.B. Harvey,* a ship was arrested by the court pursuant to a creditor's claim of a maritime lien. After a post-seizure hearing, the court dissolved the warrant of arrest. The ship had been scheduled to leave port on the day the warrant was dissolved, and the ship did in fact leave the jurisdiction on that day. We noted that "[a]ccidental, fraudulent, or improper removal of the res from the district does not destroy in rem jurisdiction once it existed," but there were no charges of impropriety in

that case. 712 F.2d at 459. Although we do not suggest that the government intended to defraud Leybda or this court, it is apparent that there was no proper motive for removing the aircraft from this jurisdiction, especially since Leybda had already filed a notice of appeal.[3] The government has offered no explanation for its decision to store this jet in Missouri as opposed to Florida, instead relying exclusively on the fact that if Leybda wanted to avoid a loss of jurisdiction it could have moved for a stay of execution pending an appeal or it could have posted a supersedeas bond. Although *L.B. Harvey* and *Taylor* refer to the appellants' failure to utilize such procedures, the government may not raise such an argument without showing some justification for removing the res from the jurisdiction. In reaching this conclusion, we are guided by "[a]n interest in justice rather than an automatic reliance upon rigid legalism." *Treasure Salvors v. Unidentified*

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3. The government argues that their motive in removing the jet from the jurisdiction was not improper. In support of this proposition, the government has cited *United States v. $79,000 in U.S. Currency*, 801 F.2d 738 (5th Cir.1986). In *$79,000*, the court held that the removal of forfeited currency from the jurisdiction deprived the court of the power to hear the appeal. "The government merely acted in its own favor by quickly initiating action to surrender the monies; its actions do not rise to the level of fraud or impropriety . . . ." *Id.* at 740. The key distinction between *$79,000* and the instant case lies in the nature of the forfeited property. When the government removes forfeited *currency* from the jurisdiction, the forfeited property confers a benefit upon the government apart from the avoidance of an appeal. The currency becomes mixed in with the rest of the money in the federal coffers. In this case, the removal of the jet confers no benefit on the government unless it suffices to deprive the court of jurisdiction. The jet is merely being warehoused in another jurisdiction. Where the only apparent motive behind removing the res from the jurisdiction is to obtain dismissal of an appeal, this court will retain jurisdiction.

Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 334 (5th Cir.1978).

In *Taylor,* crew members sued in rem against a vessel to obtain payment of past wages. The vessel was sold and the proceeds were distributed to priority lienholders. We dismissed the claim as moot since the res was no longer located in the jurisdiction, but noted that "[h]ad this case also involved claims in personam, jurisdiction might still lie." 683 F.2d at 1362 n.2 (citing *Treasure Salvors, supra,* and *Inland Credit Corp. v. M/T BOW EGRET,* 552 F.2d 1148 (5th Cir.1977)). Jurisdiction in this case is not based solely on the presence of the res in the jurisdiction. The government, by bringing this action, has submitted itself to the personal jurisdiction of this court. *See Adam v. Saenger,* 303 U.S. 59, 67-68, 58 S.Ct. 454, 458, 82 L.Ed. 649 (1938); *cf. Treasure Salvors,* 569 F.2d at 335 (government, by intervening in the action and by stipulating to the court's admiralty jurisdiction, waived the usual requirement that the res be present). Moreover, the district court had personal jurisdiction over Leybda by virtue of Leybda's intervention in this matter. *See Treasure Salvors,* 569 F.2d at 335 & n. 6. Thus, since this court has the power to fashion an effective remedy (i.e., requiring the government to return the aircraft), the appeal is not mooted by the fact that the res is outside the jurisdiction. *Cf. Taylor,* 683 F.2d at 1362 (since proceeds from sale of vessel had already been disbursed, any order which the court might issue would be an "empty gesture").

In sum, we note that the fiction of an inanimate object as a defendant is designed to effectuate the adjudication of disputes. The use of this fiction in an attempt

to avoid resolution of disputes is disfavored. *See Treasure Salvors,* 569 F.2d at 334. The government's decision to remove the aircraft from this jurisdiction while Leybda's notice of appeal was pending, and for no objectively justifiable reason, does not deprive this court of jurisdiction to entertain this appeal.

II. SCOPE OF THE IMMIGRATION FORFEITURE STATUTE

This is an unusual forfeiture case because the underlying offense does not concern alien smuggling or drug trafficking. The district court observed that this was the first reported forfeiture case where the predicate offense was visa fraud.[4] 617 F.Supp. at 776. Leybda argues that this "unprecedented extension" of 8 U.S.C. § 1324 is inconsistent with the general rule that forfeiture statutes be construed narrowly. *See United States v. One 1977 Cadillac,* 644 F.2d 500, 501 (5th Cir. Unit B May 1981). We disagree. Leybda's reading of the statute to preclude reliance on visa fraud as a predicate to forfeiture disregards the clear language of the forfeiture statute.

Although alien smuggling was a major target of 8 U.S.C. §1324, it was not the only target. Section 1324(b) allows for forfeiture when a vehicle is involved in the violation of one of the predicate offenses defined in § 1324(a). Section 1324(a) provides:

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4. Leybda's expert witness, Donald Berman, testified that he had never seen the forfeiture statute used in this manner. "I have seen it used for large scale or even single alien smuggling. But I have never seen it when there was a question of paperwork." Record, Vol. 17 at 12.

(a) Persons liable

Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including any *alien crewman*, not duly admitted by an immigration officer or *not lawfully entitled to enter or reside within the United States* under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (includ-

> ing the usual and normal practices incident to employment) shall not be deemed to constitute harboring. (emphasis added)

Although we agree with Leybda that forfeiture statutes should be construed narrowly, there is no room for interpretation in this case. The aircraft was used to bring into the United States "an alien crewman . . . not lawfully entitled to *enter* or reside within the U.S." This case fits squarely within the scope of the statutory language.

III. MATERIALITY OF MISREPRESENTATIONS

Forfeiture under 8 U.S.C. § 1324(b) is predicated on the violation of § 1324(a). Section 1324(a), however, merely provides that aiding the "unlawful" entry of aliens is a felony. To determine whether the entry was "unlawful," § 1324(a) directs us to look to "the terms of this chapter or any other law relating to the immigration or expulsion of aliens." 8 U.S.C. § 1324(a). In this case, the government alleges the aircraft was used in an entry which was unlawful under 8 U.S.C. § 1182(a)(19), which provides that:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

The district court found that Espinosa, Herrera, and Toledo willfully misrepresented facts in their Managua

visa applications. These factual findings are not clearly erroneous, and they will be accepted by this court. The court also found that these misrepresentations were material because if the applications had been accurate, "further action may have been taken and further investigation may have been made by U.S. Customs officials." 617 F.Supp. at 775. The officials "might have considered the applications in a different light and at the very least conducted further inquiry." *Id.* Furthermore, "an investigation into the relationship between the appellants and Cuba may have been commenced." *Id.* Materiality is a mixed question of fact and law. To the extent these statements are findings of fact as to the probability of further investigation, they are not clearly erroneous, and are accepted. Leybda contends the district court applied an incorrect legal standard in holding that, because of the probability of further investigation, the misrepresentations were material.

Leybda argues that the district court should have required the government to prove that, but for the misrepresentations, the crew members *would* have been ineligible to receive visas. We disagree. Under 8 U.S.C. § 1182(a)(19), the government need not establish such a causal relation between the misrepresentation and the granting of the visa application. *See Duran-Garcia v. Neelly,* 246 F.2d 287 (5th Cir.1957). In *Duran-Garcia,* the misrepresentation involved was somewhat similar to the ones involved in the present case. A Mexican citizen received a "crossing card" entitling her to shop and visit in the United States. When government authorities subsequently discovered that she was living and working in the United States, they cancelled her crossing card and

granted her the privilege of voluntary departure to Mexico in lieu of deportation. Three years later, and under a new name, she again applied for a local crossing card for the stated purpose of shopping and visiting. She again began to live and work in Texas. In a subsequent deportation proceeding, an immigration officer concluded that in her second application she failed to disclose the true purpose of her visit and failed to disclose the fact that she had previously accepted voluntary departure in lieu of deportation. This court held both misrepresentations to be material under 8 U.S.C. § 1182(a)(19). The failure to disclose the prior "quasi deportation proceedings" was material because it would "have suggested further inquiry into appellant's actual motives." Significantly, we held that the government need not show that there existed underlying facts which, if discovered after further inquiry, would have precluded the grant of a visa:

> Though perhaps a complete inquiry would have resulted in a discovery of no other material facts than the previous involuntary departure, it has been held that any concealment of information that tends to frustrate the proper official investigations is grounds for excludability under the statute, particularly if the deception is directed primarily against the United States. Landon v. Clarke, [239 F.2d 631 (1st Cir. 1956]. . . .

Id. at 291. Thus, according to *Duran-Garcia,* a misrepresentation may be material because it frustrates the government's ability to assess the visa application in its true light.

In this case, each crew member misrepresented at least three facts: (1) their residency in Cuba during the period

immediately prior to filing the visa application; (2) their prior submission of visa applications to the United States Interest Section in Havana; and (3) their prior employment as pilot and crew members for Cubana Airlines. We have little doubt that these misrepresentations were "material" for purposes of 8 U.S.C. § 1182(a)(19). As in *Duran-Garcia,* disclosure of the applicant's close ties with Cuba would have changed the very nature of their applications. The reluctance of the United States to engage in all forms of trade with Cuba is evident in our export regulations. *See* 15 C.F.R. § 385.1 (noting general policy to deny all applications to trade with countries in group Z, one of which is Cuba.) It is also clear that the United States' reluctance to trade with Cuba stems from concerns over national security and foreign policy. *Id.* While these regulations certainly would not preclude the issuance of a visa to former Cuban citizens, they indicate the significance of the misrepresentations in this case. Since the misrepresentations deprived the United States officials in Managua of the opportunity to weigh the true implications of their decision to grant visas to these crew members, these misrepresentations were material for purposes of 8 U.S.C. § 1182(a)(19). *Cf. United States v. Palciauskas,* 734 F.2d 625, 628 (11th Cir. (1984) (failure to disclose former employment as mayor of Nazi controlled town was a material misrepresentation on a citizenship application, even though applicant might have been able

to convince authorities that mayorship was a figurehead position).[5]

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5. We are aware of several decisions discussing materiality in the context of denaturalization proceedings. In *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), the Supreme Court decided that where the government seeks to revoke an individual's citizenship because of a material misrepresentation on a citizenship application, the government must show either: "(1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure *might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting the denial of citizenship." *Id.* at 355, 81 S.Ct. at 151 (emphasis added). We do not believe that *Chaunt* applies in the context of a forfeiture predicated upon visa fraud. *Accord Fedorenko v. United States*, 449 U.S. 490, 508, 101 S.Ct. 737, 748, 66 L.Ed.2d 686 (1981) (dicta) (suggesting that distinction between citizenship application and visa application could render *Chaunt* inapplicable to situations involving the latter); *id.*, 101 S.Ct. at 755 (Blackmun, J., concurring) (where government seeks to revoke the precious right of citizenship, it may do so only on "scrupulously clear justification and proof"). Even if *Chaunt* does apply in this context, the government's evidence in this case was sufficient to satisfy the second prong of the *Chaunt* test.

Leybda also contends that *Fedorenko, supra*, requires reversal of the district court's opinion in light of the Supreme Court's statement that "the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country." 449 U.S. at 509, 101 S.Ct. at 749. We disagree. While *Fedorenko* involved misrepresentations on a visa application, the government in that case was seeking to revoke Fedorenko's citizenship because of his misstatements. Again, in the denaturalization context the government is held to a very high standard of proof. The Court declined to consider whether the *Chaunt* test applied when the misstatements were made upon the individual's initial entry into the country rather than upon his application for citizenship. The misstatements were material under any standard since Fedorenko's former employment as an armed guard at the Treblenka concentration

(Continued on following page)

Leybda places great reliance on its allegation that, in 1984, the three crew members involved in this case were granted visas to enter the United States. The only evidence supporting this allegation comes from the testimony of the crew members themselves through letters rogatory. The government disputes that these visas were granted, noting that because they were previously deported, the crew members could only have been granted visas by special permission of the attorney general. 8 U.S.C. § 1182 (a)(17). Leybda has not produced documentary evidence that these visas have in fact been granted.

Assuming arguendo that the crew received visas in 1984, our holding that the 1980 misstatements were material would remain unchanged. The theory underlying *Duran-Neelly* and *Palciauskas* is that misrepresentations are material if they could have had a significant impact on the decision making process of the immigration official authorized to grant or deny the visa. Disclosure of the true facts on the visa applications involved in this case almost certainly would have affected the decision made in 1980 with regard to those applications by the United States embassy in Managua.

The essential feature of a material misrepresentation is that it misleads the government officials with respect

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(Continued from previous page)

camp would have, if disclosed, disqualified him from obtaining citizenship as a matter of law. Given the unusual circumstances in *Fedorenko,* the Court's unwillingness to develop a new materiality standard, and the fact that the government was seeking denaturalization as opposed to forfeiture, we find that *Fedorenko* has little bearing on the present case.

to an area of *potential* significance in the decision to grant or deny the visa By hiding their past association with Cubana Airlines, their lifetime residence in Cuba, and their prior visa applications as Cuban citizens, the crew members deprived the United States officials in Managua of the chance to assess the international implications raised by their visa applications. Since an applicant's prior association with Cuba is a significant area of inquiry, failure to disclose such a prior association is a material misrepresentation under 8 U.S.C. § 1182(a)(19).

IV. BURDEN OF PROOF ON THE INNOCENT OWNER DEFENSE

The district court found that Leybda failed to prove an absence of actual knowledge of the violations of 8 U.S.C. § 1324(a). 617 F.Supp. at 775. Leybda contends that, under the version of § 1324(b) applicable at the time of the forfeiture, the burden was on the government to prove Leybda's actual knowledge of the illegality.

In 1980, when this proceeding began, § 1324(b) was silent on the issue of burden of proof. The language with regard to the "innocent owner" defense was the following:

> No conveyance used by any person as common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to the illegal act.

8 U.S.C. § 1324(b)(1)(A). A 1981 amendment to the statute makes it clear that once the government establishes probable cause for instituting the forfeiture action, the

burden of proof shifts to the claimant. 8 U.S.C. § 1324(b)(5) (West Supp.1986). Leybda points to the amendment and accompanying legislative history[6] in support of its argument that, under the 1980 version of the statute,[7] the government bore the burden of proof.

At trial, Leybda conceded the burden of proof issue on two separate occasions. Just before the government's first witness was called, the government argued that Leybda had the burden of proof on the innocent owner defense. After the court expressed its agreement with the government's position, Leybda's counsel said "I think Mr. Goodman [the U.S. Attorney] is right about that." Record, Vol. 11 at 55. Again, during closing argument, Leybda's counsel stated "it is true that Leybda Corporation must prove that they did not have actual knowledge." Record, Vol. 19 at 31.

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6. The House Report on the 1981 amendment indicated that the law was being strengthened in order to remove ambiguity regarding the government's responsibilities in forfeiture procedures. The report notes that "the Office of Legal Counsel for the Department of Justice concluded that while existing law can be read to permit seizure prior to any inquiry as to the owners complicity, the government bears the burden of establishing actual knowledge on the part of the owner to affect a forfeiture of the conveyance." 1981 U.S.Code Cong. & Admin. News 2577, 2596-97. The report goes on to note that "this legislation relieves the government of the burden of proving actual knowledge on the part of owners." *Id.* at 2597. According to Leybda, the foregoing shows that, under pre-1981 law, the government was required to prove actual knowledge.

7. At trial, the government conceded that the 1980 version of the statute applies to this case. We are, of course, not bound by this concession, but given our disposition of this matter we find it unnecessary to pass upon the retroactivity of the 1981 amendments.

An appellate court generally will not consider an issue raised for the first time on appeal unless failure to do so would result in a miscarriage of justice. *Sanders v. United States,* 740 F.2d 886, 888 (11th Cir.1984). This is especially true where the appellant pursued a contrary position before the district court.[8] *Id.* Failure to decide the burden of proof issue is not a miscarriage of justice in this case because we find, upon examination of the record, that the government offered sufficient evidence of actual knowledge to satisfy the burden of proof, assuming the government bore that burden under the 1980 version of the statute.

V. OTHER ISSUES

A. *Use Of Hearsay.*

Leybda complains that much of the evidence relied on by the district court was inadmissible hearsay. The most damaging evidence introduced by the government, i.e. the visa applications and Leybda's corporate records, was admissible under the government and business records exceptions to the hearsay rule. *See* Fed.R.Evid. 803(6) & (8). To the extent hearsay was improperly admitted, we find any error harmless. *See Fishing Fleet Inc. v. Trident Insurance Co.,* 598 F.2d 925 (5th Cir.1979) (in a bench

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8. Leybda points out that it contested the burden of proof issue in the parties' pretrial stipulation. Still, the issue was not squarely before the district court because the pretrial stipulation preceded Leybda's concession of this issue at trial.

trial it is presumed that a ditsrict judge's findings are based on admissible evidence).[9]

B. *Assertion Of Privileges By The Government.*

During discovery, the government refused to produce certain documents because the documents were said to be protected by various privileges. The government contended that the documents contained sensitive information and submitted the documents to the district court for *in camera* review. The district court upheld the government's claims of privilege and found that the documents were irrelevant to this case. Leybda argues on appeal that the government was improperly permitted to invoke the jurisdiction of the court while hiding behind privileges in an attempt to hinder Leybda's defense. We are persuaded that the district court's finding that the documents were privileged and irrelevant precludes Leybda's argument that the government should have had to "disclose or dismiss."

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9. The government argued that otherwise inadmissible hearsay is admissible in a forfeiture proceeding to establish probable cause for instituing the proceeding. *See Bush v. United States*, 389 F.2d 485, 489 (5th Cir.1968). 8 U.S.C. § 1324(b)(5), enacted in 1981, makes clear that the government need only establish probable cause in order to shift the burden of proof over to the claimant. *Bush* makes clear that hearsay would be admissible to satisfy the government's burden under this statute. Again, given our disposition of this issue, we need not decide the extent of the government's burden under the 1980 version of the statute. As a result, we express no opinion as to the applicability of *Bush* where the government's burden is greater than merely the establishment of probable cause.

C. *Request For A Jury Trial.*

The government's complaint in this case was filed on January 19, 1981. Leybda requested a jury trial pursuant to Fed.R.Civ.P. 39(b) on June 25, 1985. Leybda's sole argument in support of its 39(b) motion was that the district court viewed allegedly prejudicial government documents during an *in camera* proceeding to determine whether the documents were privileged. This procedure did not render the district judge incapable of presiding over a fair bench trial. The district court did not abuse its discretion in denying Leybda's jury trial request as untimely. *See Parrott v. Wilson,* 707 F.2d 1262, 1267 (11th Cir.), *cert. denied,* 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983).

D. *Surprise Evidence.*

On the eve of trial, FBI Agent Duran notified the United States Attorney that he had discovered additional notes regarding his investigation. These notes were turned over to Leybda's counsel. Leybda contends that the district court should have granted a continuance or ordered a mistrial since these notes revealed "scores of new eyewitnesses." The district court made every attempt to allow Leybda to conduct additional discovery during trial. Moreover, there is no indication that Leybda was prejudiced by the late disclosure of the notes. The United States Attorney, who had no previous knowledge that the notes existed, made no use of the notes at trial. In addition, the eyewitness most prominently mentioned in the notes, David Block, would not have been a crucial witness. Block's plane landed in Miami just after the Lear Jet landed, and

he observed the jet's crew while they were being inspected by custom officials. Under these circumstances, the district court was not required to declare a mistrial, and its efforts to facilitate discovery during trial were a sufficient substitute for a continuance.

VI. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES of America, Plaintiff,

v.

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, Defendant.

No. 81-6031-Civ.

United States District Court, S.D. Florida, S.D.

Sept. 12, 1985.

Action was brought for forfeiture of aircraft. The District Court, Nesbitt, J., held that: (1) misrepresentations made by pilot and crew members of aircraft in visa applications were material and justified probable cause belief by agents of the United States that aircraft's entry into the United States was in violation of statute relating to bringing in and harboring certain aliens; (2) Government raised a presumption of actual knowledge of the misrepresentations on the part of the claimant, which claimant failed to negate; and (3) defense of duress was unavailable to claimant where initial arrival of aircraft in the United States was result of planned and scheduled flight.

Aircraft forfeited.

* * *

Jonathoan Goodman, Asst. U.S. Atty., Miami, Fla., for plaintiff.

Ira Kurzban, Kurzban, Kurzban & Weinger, P.A., Miami, Fla., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NESBITT, District Judge.

THIS ACTION was tried before the Court. Upon the testimony and the evidence presented, the Court, pursuant to Rule 52(a), Fed.R.Civ.P., enters the following findings of fact and conclusions of law. In making these findings, the Court has considered letters rogatory, depositions, and documents introduced as well as the testimony at trial, and relies only upon those portions of the evidence that are relevant and material and presented by witnesses competent to testify. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1345 and 1355.

FINDINGS OF FACT

This case involves a forfeiture action by the United States against One Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO (Lear jet). The Claimant, Leybda Corporation (Leydba), has asserted ownership of the aircraft and challenges the validity of this forfeiture action. The Amended Complaint contains five counts. Count II was dismissed by Order of Court prior to the time of trial. During trial, the Government dismissed

Count III. The case is now before the Court as to Counts I, IV and V. Count I of the Complaint alleges the 1980 version of 8 U.S.C. § 1324 as a basis for forfeiture. This statute provided in pertinent part as follows:

> (a) any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs; provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.
>
> (b)(1) any vessel, vehicle or aircraft which is used in the commission of a violation of subsection (a) shall be subject to seizure and forfeiture, except when—
>
> (A) the owner, master or other person in charge of such vessel, vehicle or aircraft, was not, at the time of the alleged illegal act, a consenting party or privy thereto.

Counts IV and V assert that forfeiture is also appropriate under 22 U.S.C. § 401(a) (1979) which provides as follows:

> (a) Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law, or whenever it is known or there shall be probable cause to believe that any arms or munitions of war or other articles are intended to be or are being or have been exported or removed from the United States in violation of law, the Secretary of the Treasury, or any person duly authorized for the purpose by the President, may seize and detain such arms or munitions of war or other articles and may seize and detain any vessel, vehicle, or aircraft containing the same or which has been or is being used in exporting or attempting to export such arms or munitions of war or other articles. All arms or munitions of war and other articles, vessels, vehicles, and aircraft seized pursuant to this subsection shall be forfeited.

Specifically, the United States alleges that the crewmembers of the Lear jet, with knowledge by Leybda, made material misrepresentations in their visa applications, thereby entering the United States in violation of 8 U.S.C. § 1324 and subjecting the Lear jet to forfeiture. Furthermore, the Government contends that the Lear jet was exported in violation of the export regulations located at 15 C.F.R. § 385.1 and 15 C.F.R. § 387.4.

The facts, as adduced at trial, indicate that on September 1, 1980, the Lear jet aircraft landed at Miami International Airport. At that time, the pilot, Simeon Delfin Espinosa (Espinosa), and two crewmembers, Jorge Hermengildo Toledo Infante (Toledo) and Luis Leonardo Herrera Altuna (Herrera), each presented Nicaraguan passports issued in their names to the United States Customs Inspectors. Each passport contained non-immigrant B-1 and D-1 visas issued by the United States Em-

bassy in Managua. The visa applications were submitted to United States authorities in Managua, Nicaragua, in April, 1980.

Upon arrival in the United States, all three crewmembers completed INS form I-94. I-94 forms, given to non-immigrant aliens to complete upon arrival in the United States, require that among other things, a non-immigrant alien provide his United States address. In the instant case, each crewmember claimed that he was a citizen of Nicaragua and that he had boarded in Managua, Nicaragua. Furthermore, each listed Cuba as their place of birth and provided their Nicaraguan passport numbers.

On September 2, 1980 the jet was flown to Fort Lauderdale-Hollywood International Airport for repairs. On September 5, 1980, agents of the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS) observed Espinosa, Toledo, Herrera and a fourth man, later identified as Oscar Vasquez, preparing the aircraft for departure from Fort Lauderdale airport. The agents interviewed the three crewmembers and briefly spoke to Vasquez. FBI Special Agent Duran testified at trial that Espinosa stated that he arrived in Miami on September 1, 1980 in order to repair the Lear jet and flew it to Fort Lauderdale on September 2 for the same reason.

During the September 5, 1980 airport interview, Espinosa presented a pilot's license issued to him by the Nicaraguan government. He further stated that the Lear jet was owned by a Panamanian company with which Oscar Vasquez was affiliated. Espinosa denied applying for a visa in Havana to pilot Cubana Airlines charter

flights to the United States. Both Toledo and Herrera also denied applying for a visa in Havana in 1979 and 1980 as Cubana Airlines crewmembers. The three crewmembers were arrested and charged with violating United States immigration laws and the Lear jet was seized.

In prior criminal procedures, each of the crewmembers was indicted on various counts of visa fraud in violation of 18 U.S.C. § 1546. Each crewmember ultimately changed his plea and pled guilty to one immigration violation, under 18 U.S.C. § 1546, of knowingly possessing a visa application which contained false representations. A United States Immigration Judge determined that Espinosa, Toledo and Herrera were admitted to the United States by presenting a visa obtained by filing a visa application misrepresenting material facts.

At trial, the Government introduced evidence of false or inconsistent statements made by each of the crewmembers in different visa applications and other government forms in support of its claim for forfeiture under Count I of the amended complaint. The discrepancies existing among the various visa applications are numerous. Several of the discrepancies are the result of misrepresentations made on the visa applications submitted in Managua on April 9, 1980 and resulted in the crewmembers admission to the United States in September of 1980. By way of illustration rather than limitation the Court finds that the following misrepresentations and discrepancies exist as to each of the crewmembers.

Espinosa. On June 26, 1979 Espinosa filed a visa application at the United States Interests Section in Havana, Cuba. In this application Espinosa stated that

he was a Cuban citizen employed by Cubana de Aviacion—the Cuban state government airline. In addition, he stated that he had resided in Cuba during the previous 34 years—his entire life. Espinosa, in a visa application submitted in Nicaragua on April 9, 1980, represented that he was a Nicaraguan national. In his visa application filed in Havana in June 1979, however, Espinosa represented himself as a Cuban national. His February 15, 1980 application for a Panamanian pilot's license, however, represents his nationality as Cuban. In his visa application filed in Managua, Espinosa denied ever making a prior visa application. This statement is in direct conflict with the fact that he submitted a visa application to the United States Interests Section in Havana. In his April 1980 visa application filed in Nicaragua, Espinosa represented himself as an employee of the Nicaragaun Department of Transportation. In contrast, his prior visa application represented that he was a crewmember of Cubana Airlines. When submitting the visa application to the United States Embassy in Managua, Espinosa represented that he had lived in Managua during the prior ten years. His visa application filed in Cuba the year before claimed that he had resided in Cuba during the previous 34 years. Furthermore, the visa application that Espinosa filed in Managua expressly asked him to indicate all countries he had lived in for more than six months during the past five years. Espinosa wrote Nicaragua, failing to indicate Cuba. The photograph and signature on each application appear to be of the same person.

Toledo. Toledo submitted two visa applications to the United States Interests Section in Havana. In the first application submitted on July 9, 1979, Toledo repre-

sented himself as a Cuban national who resided in Havana. In the second application filed on January 15, 1980, Toledo listed himself as a Cuban national residing in Havana. Toledo's April 9 application stated that he was a Nicaraguan national. However, in a visa application filed with the United States Interests Section in Havana on January 15, 1980, he represented that he was a Cuban national. Furthermore, Toledo's February 15, 1980 application for a Panamanian pilot's license stated that he was a Cuban national. In his visa application filed in Managua. Toledo denied ever making a prior visa application. As demonstrated by the Havana Interests Section visa applications introduced during trial, it is clear that Toledo had made two prior applications. In his April 1980 visa application filed in Managua, Toledo represented himself as an employee of the Nicaraguan Department of Transportation. In his January 1980 visa application filed in Havana, however, Toledo identified himself as a crewmember of Cubana Airlines. In the visa application filed in Managua, Toledo represented that he had resided in Nicaragua during the prior ten years. In contrast, the application he filed a few months earlier in Havana lists a Cuban address as his domicile. The photographs and signatures in the applications appear to be of the same person.

Herrera. Herrera also submitted two visa applications to the Interests Section in Havana. In the first, Herrera represented himself to be a Cuban national. In his second application, made on June 22, 1979, Herrera stated that he had lived in Cuba for 32 years—his entire life. This application expressly stated that he had been in the United States in 1978, as a crewmember for Cubana

Airlines. Herrera filed a third application at the Interests Section in Havana in July 1979, in which he again indicated he had been in the United States in 1978. Herrera's application submitted to United States authorities in Managua on April 10, 1980, represented that he was a Nicaraguan national. In the earlier applications filed in Havana, Herrera represented himself as a Cuban national. As did the others, Herrera denied making any prior visa applications. In the earlier visa applications made in Cuba, Herrera identified himself as an employee of the official Cuban government airline. In his April 1980 visa application in Managua, he represented himself as an employee of the Nicaraguan Department of Transportation. In the visa application filed in Nicaragua, he claimed that he had resided in Nicaragua during the previous six years. But in one of several visa applications presented the previous year to the United States Interests Section in Cuba, Herrera represented that he had resided in Cuba during the preceding 32 years. In addition, Herrera denied ever being in the United States in his April 1980 visa application submitted in Managua. The 1979 general declarations from Cubana Airlines list Herrera as a crewmember. In addition, Herrera expressly stated, in his July 4, 1980 application filed in Cuba, that he had been in the United States. The photographs in the different visa applications appear to be of the same person, but they are prints of the very same photograph. The signatures appear identical.

Based on the above-described discrepancies, the Government asserts that Espinosa, as pilot of the Defendant aircraft on September 1, 1980, knew that he and the two

crewmembers were not lawfully entitled to enter or reside within the United States because he knew that the visa applications contained false representations. Espinosa was in charge of the Defendant aircraft on September 1, 1980 and consented to, and was privy to, the immigration violations that he and his two crewmembers committed. In their Letters Rogatory testimony, Espinosa, Toledo and Herrera admit to signing the visa applications submitted to the United States Embassy in Managua, Nicaragua.

CONCLUSIONS OF LAW

Under Counts IV and V of the Complaint, the Government alleges that because Cuba was the ultimate consignee of the Defendant aircraft and because no export license was obtained as required by 15 C.F.R. § 385.1, the aircraft was exported in violation of 15 C.F.R. § 385.1 and 15 C.F.R. § 387.4. Without reaching the question of who was the ultimate consignee of the aircraft, the Court finds that the Government has failed to prove that Leybda Corporation had not obtained an export license for the Lear jet. Not one of the Government's witnesses testified that Leybda had failed to obtain the appropriate export license, nor did the Government introduce any documentary evidence attesting to Leybda's failure to obtain the appropriate licensing. Even the Government, in its Memorandum on Judicial Admissions, agrees that its reliance on Leybda's non-verified third party complaint which has been severed from this action is insufficient to establish the non-existence of an export license.

In support of Counts IV and V, the Government relies on the statement of Robert Duncan[1] that Management Jets International did not obtain an export license. However, even the Government has admitted in its Response to the October 19, 1984 Request for Admissions, that whether or not Management Jets International obtained an export license is entirely separable from the question of whether or not Leybda obtained an export license. Accordingly, the Court finds that the Government has failed to produce sufficient evidence in support of Counts IV and V of the Complaint. Therefore, judgment shall be entered in favor of the Claimant as to Counts IV and V.

Count 1 of the Complaint is brought under the prior 1980 version of 8 U.S.C. § 1324. In order to recover under this statute and be entitled to the forfeiture of the Lear jet, the Government must show probable cause for the institution of the suit. *United States v. One 1971 Chevrolet Corvette Automobile,* 496 F.2d 210, 212 (5th Cir. 1974). The Government predicates probable cause in this case upon the material misrepresentations made by Espinosa, Toledo and Herrera in the visa applications submitted to U.S. officials on April 9, 1980 in Managua, Nicaragua. As a result of these misrepresentations, the Government contends that the crewmembers were not lawfully entitled to enter the United States under 8 U.S.C. § 1182(a)(19) subjecting the Defendant aircraft to forfeiture under 8 U.S.C. § 1324.

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1. Robert Duncan is the President of Duncan Aviation, the parent company of Management Jets International. Management Jets is the company which sold the Defendant Lear Jet to Leybda Corp.

Initially, the Court finds that 8 U.S.C. § 1182(a)(19) applies to this case as the crewmembers made material misrepresentations in their visa applications of April 1980. Had the response required in the visa application been accurate, further action may have been taken and further investigation may have been made by U.S. Customs officials. For example, if the crewmembers had correctly listed their prior residence in Cuba in applying for a visa, officials might have considered the applications in a different light and at the very least conducted further inquiry. Even a cursory investigation would have revealed that Espinosa, Toledo and Herrera submitted prior visa applications as crewmembers for Cubana de Aviacion, the official Cuban government airline and that Toledo submitted a visa application in Havana as a Cubana Airlines crewmember as recently as three months before the Managua application. Similarly, officials could have determined that Toledo's visa, which was submitted in Havana, was issued less than two months earlier. Had government officials known that the crewmembers lived in Cuba and had submitted prior visa applications, an investigation into the relationship between the applicants and Cuba may have been commenced. Based on the foregoing, the Court finds that the misrepresentations were material under 8 U.S.C. § 1182(a)(19) and justified a probable cause belief by agents of the United States Government that the Defendant aircraft's entry into the United States on September 1, 1980 violated 8 U.S.C. § 1324(a).

The Court must next determine whether Leybda Corp. has successfully proven an absence of actual knowledge of the material misrepresentations and the violation of 8 U.S.C. § 1324(a). Once the Government demonstrates

probable cause, the burden shifts to the Claimant, whose responsibility it is to prove the absence of actual knowledge. *See United States v. Four Million, Two Hundred Fifty-Five Thousand,* 762 F.2d 895 (11th Cir. 1985). It is not the Government's burden to prove that the Claimant had actual knowledge. *Id.* The Court finds that the Claimant has failed to satisfy its burden as to the absence of actual knowledge. The Claimant presented no credible evidence that it was not aware of the crewmembers' unlawful entry into the United States. In fact, evidence was introduced during trial indicating that the Claimant knew about the visa applications submitted by the three crewmembers and was in fact acting in concert with them. The evidence established that Oscar Vasquez acted as Leybda's agent and was involved in all aspects of the purchase and operation of the Defendant Lear jet. Documents introduced during the course of the trial indicated that it was Vasquez who arranged to have the three crewmembers and the jet flown to the United States for repairs. As the Claimant produced no owner director or officer of Leybda, Oscar Vasquez is the only known agent of Leybda. The only evidence from a Leybda official is from Jacinto Obregon Sanchez whose name does not appear on any documents submitted to the Court. Despite Obregon's testimony in the Letters Rogatory received by this Court, the evidence indicates that Oscar Vasquez was the only individual acting on behalf of Leybda during the events which occurred prior to the seizure of the aircraft. The Court finds that the Government raised the presumption of actual knowledge which the Claimant failed to negate. *United States v. One 1975 Ford F-100 Pick-up Truck,* 558 F.2d 755, 756 (5th Cir.1977); *United States v. One 1971 Chevrolet Corvette Automobile,* 496 F.2d at 212.

The Claimant has asserted several defenses which merit only brief discussion. The Claimant asserts that it landed the plane in Fort Lauderdale on September 4, 1980 because of an emergency caused by a faulty fuel computer. In essence, the Claimant asserts that the Lear jet entered the United States under the duress caused by the faulty fuel computer. In order to establish the defense of duress, Leybda must show that the pilot and crewmembers flew the defendant Lear jet into the United States because

> (1) [they were] under an immediate threat of death or serious bodily injury,
>
> (2) [they] had a well-grounded fear that the threat would be carried out, and
>
> (3) [they] had no reasonable opportunity to escape.

United States v. Blanco, 754 F.2d 940 (11th Cir.1985).

The facts of the case, as adduced during trial, indicate that the immigration violations occurred during the September 1, 1980 landing of the Lear jet. The facts also showed that the jet arrived in Miami on September 1, as the result of a planned and scheduled flight from Cuba rather than as the result of a sudden emergency. Accordingly, the Court finds that the defense of duress is unavailable to the Claimant.

Leybda also asserts that 8 U.S.C. § 1324 is inapplicable to the circumstances surrounding the seizure of the Defendant Lear jet. Research has not revealed nor have the parties brought to the Court's attention, a case involving similar facts brought under 8 U.S.C. § 1324. Although this statute is penal in nature and requires strict construction, *see United States v. Washington,* 471 F.2d 402 (5th Cir.), *cert. denied,* 412 U.S. 930, 93 S.Ct. 2759, 37 L.Ed.2d 158

(1973); *see also Mayo v. United States,* 413 F.Supp. 160 (E.D.Ill.1976) (holding that statutes authorizing forfeiture must be construed with strictness), it is the view of this Court that the words of the statute are clear and unambiguous and therefore shall be given their literal and ordinary meaning, *United States v. Bryant,* 671 F.2d 450 (11th Cir.1982); *Smith v. Pingree,* 651 F.2d 1021 (5th Cir. 1981).

The Court finds that this case presents a situation where an aircraft was used to bring into the United States "an alien crewman . . . not lawfully entitled to enter or reside within the United States." 8 U.S.C. § 1324. The purpose of the statute is satisfied by the forfeiture of the Defendant Lear jet. Leybda has presented no case law in support of its theory that this statute applies solely to traditional "smuggling" cases. Indeed, the United States Court of Appeals for the Fifth Circuit has rejected this argument in *United States v. Washington,* upon 471 F.2d 402, 404 (5th Cir.), *cert. denied,* 412 U.S. 930, 93 S.Ct. 2759, 37 L.Ed.2d 158 (1973). Accordingly, the Court finds that 8 U.S.C. § 1324 applies to the facts of this case.

Finally, the Claimant asserts that because the three crewmembers possessed B-1 and D-1 visas but were admitted to the United States as B-2 immigrants, there was no violation of 8 U.S.C. § 1182(a)(19) and hence no justification for the forfeiture of the Defendant aircraft. The Claimant introduced evidence through an attorney specializing in immigration to support its assertion that a B-2 visa is entirely distinct from a B-1 visa and that a B-1 visa will not gain an immigrant admittance to the United States as a B-2 immigrant. Even assuming "expert testimony" was necessary to aid the court in making a deter-

mination as to the custom and practice of Customs officials in admitting or not admitting persons with certain types of visas, the Court finds in view of all the testimony that ordinarily a B-1 visa will not gain an immigrant admittance as a B-2 immigrant. However, the Court has also considered the testimony of the Customs Inspector who admitted the three crewmembers that he relied on the visas presented when admitting Espinosa, Toledo and Herrera and inadvertently admitted them as B-2 instead of B-1 immigrants. Because the Customs Inspector relied on the fraudulent visas presented by the crewmembers, the Court finds that a violation of 8 U.S.C. § 1182(a)(19) occurred subjecting the Defendant aircraft to forfeiture.

Based on the foregoing, the Court finds in favor of the Claimant as to Counts IV and V of the Amended Complaint and in favor of the Plaintiff as to Count I of the Amended Complaint. Accordingly, the Defendant Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO, is hereby forfeited to the United States Government.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5938

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO,

Defendant,

LEYBDA CORPORATION,

Claimant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 23, 1987, 11 Cir., 1987, — F. 2d —).

(Filed March 2, 1987)

Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

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* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6031-CIV-NESBITT

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

ONE LEAR JET AIRCRAFT,
Serial No. 35A-280,
Registration No. YN-BVO,

Defendant.

_____/

ORDER

(Filed November 26, 1985)

THIS CAUSE came before the Court upon Claimant's Motion for New Trial or to Reopen Record. The Court has reviewed the Motion, the opposing memorandum filed by the government and other pertinent portions of the file, and is otherwise fully advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED:

Claimant's Motion is DENIED as untimely. This Court does not have jurisdiction to grant a new trial when the motion is not served within the ten day time limitation required by Fed.R.Civ.P. 59(b). As for the Rule 60 (b) motion to reopen the record, the Claimant's Motion is

DENIED. Not only does the motion raise an argument previously submitted to the Court, but the argument is legally insupportable. *See, e.g., Kassab v. Immigration and Naturalization Service,* 364 F.2d 806 (6th Cir. 1966); *Landon v. Clarke,* 239 F.2d 631 (1st Cir. 1957).

DONE AND ORDERED at Miami, Dade County, Florida this 25 day of November, 1985.

/s/ Lenore C. Nesbitt
U.S. District Judge

cc: Jonathan Goodman, AUSA
Ira Kurzban, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6031-CIV-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FINAL JUDGMENT OF FORFEITURE

ONE LEAR JET AIRCRAFT
Serial No. 35A-280,
Registration No. YN-BVO,

(Filed September 12, 1985)

Defendant.

_____/

THIS CAUSE came on for trial before this Court in July, 1985, and findings of fact and conclusions of law having been entered on September 11, 1985, it is hereby

ORDERED AND ADJUDGED that:

1. Judgment be and hereby is entered in favor of the Plaintiff, UNITED STATES OF AMERICA, and against the Claimant, LEYBDA CORPORATION, and the Defendant, ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO.

2. The Defendant ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO, is forfeited to the UNITED STATES OF AMERICA.

3. The Defendant ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO, shall be

turned over to the United States Government for disposition according to law.

DONE AND ORDERED at Miami, Dade County, Florida this 12th day of September, 1985.

/s/ LENORE C. NESBITT
U.S. District Judge

cc. Jonathan Goodman, AUSA
Ira Kurzban, Esq.